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Supreme Court, U.S.
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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF OHIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does 38 U.S.C. § 1729 exempt the federal government from nondiscriminatory statutory prerequisites under Ohio's Crime Victims Compensation Program?

Is it constitutionally permissible for the federal government to take limited state funds intended to compensate innocent victims of violent crime in order to support a federal agency?

PARTIES

The petitioner is the State of Ohio which administers a victims of crime compensation program through the Ohio Court of Claims. The respondent is the United States of America which sought reimbursement for care provided by the Department of Veterans Affairs.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is unreported. (A-2). The decision of the United States District Court for the Southern District of Ohio, Eastern Division, is reported as *United States v. State of Ohio*, 756 F. Supp. 340 (S.D. Ohio 1990). (A-20).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered February 20, 1992. A petition for rehearing and suggestion for rehearing en banc was denied on April 3, 1992. (A-1). Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

This case involves Amendment X to the Constitution of the United States:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

and portions of 38 U.S.C. §1729:

> **§1729.** Recovery by the United States of the cost of certain care and services.

(a)(1) Subject to the provisions of this section, in any case in which a veteran is furnished care or services under this chapter for a non-service- connected disability described in paragraph (2) of this subsection, the United States has the right to recover or collect the reasonable cost of such care or services (as determined by the Secretary) from a third party to the extent that the veteran (or the provider of the care or services) would be eligible to receive payment for such care or services from such third party if the care

or services had not been furnished by a department or agency of the United Sates.

(2) Paragraph (1) of this subsection applies to a non-service-connected disability—

. . .

> (C) that is incurred as the result of a crime of personal violence that occurred in a State, or a political subdivision of a State, in which a person injured as the result of such a crime is entitled to receive health care and services at such State's or subdivision's expense for personal injuries suffered as the result of such crime.

. . .

(f) No law of any State or of any political subdivision of a State, and no provision of any contract or other agreement, shall operate to prevent recovery or collection by the United States under this section or with respect to care or services furnished under Section 1711(b) of this title.

and certain provisions of Ohio's Victims of Crime Act, Ohio Rev. Code Ann. §2743.51 *et seq.* (Anderson 1981 & Supp. 1991):

> Ohio Rev. Code Ann. §2743.51 Definitions
>
> As used in sections 2743.51 to 2743.72 of the Revised Code:
>
> (A) "Claimant" means both of the following categories of persons:
>
> (1) Any of the following persons who claim an award of reparations under sections 2743.51 to 2743.72 of the Revised Code:
>
> (a) A victim who was one of the following at the time of the criminally injurious conduct:
>
> (i) A resident of the United States;
>
> (ii) A resident of a foreign country the laws of

which permit residents of this state to recover compensation as victims of offenses committed in that country;

(b) A dependent of a deceased victim who is described in division (A)(1)(a) of this section;

(c) A third person, other than a collateral source, who legally assumes or voluntarily pays the obligations of a victim, or of a dependent of a victim, who is described in division (A)(1)(a) of this section, which obligations are incurred as a result of the criminally injurious conduct that is the subject of the claim and may include, but are not limited to, medical or burial expenses;

. . .

(E) "Economic loss" means economic detriment consisting only of allowable expense, work loss, funeral expense, unemployment benefits loss, and replacement services loss. If criminally injurious conduct causes death, economic loss includes a dependent's economic loss and a dependent's replacement service loss. Noneconomic detriment is not economic loss; however, economic loss may be caused by pain and suffering or physical impairment.

(F) "Allowable expense" means reasonable charges incurred for reasonably needed products, services, and accommodations, including those for medical care, rehabilitation, rehabilitative occupational training, and other remedial treatment and care and including replacement costs for eyeglasses and other corrective lenses. . . .

Ohio Rev. Code Ann. §2743.52 Commissioners to determine reparation awards.

(A) The court of claims commissioners that are appointed pursuant to section 2743.54 of the Revised Code have jurisdiction to make awards of reparations for economic loss arising from criminally injurious conduct, if satisfied by a preponderance of the evidence that the

> requirements for an award of reparations have been met.
>
> . . .

Ohio Rev. Code Ann. §2743.60(I).

> Reparations payable to a victim and to all other claimants sustaining economic loss because of injury to or the death of that victim shall not exceed fifty thousand dollars in the aggregate.

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PETITION FOR WRIT OF CERTIORARI

Petitioner State of Ohio respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 20, 1992.

STATEMENT OF THE CASE

The instant case comes before this Court upon the petition of the State of Ohio for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in *United States of America v. State of Ohio,* No. 92-3289. (A-2). The circuit court affirmed the judgment of the district court which entered a declaratory judgment that the "economic loss" requirement in Ohio's Victims of Crime Act, Ohio Rev. Code Ann. § 2743.52 conflicts with and is preempted by 38 U.S.C. §1729.[1] The State of Ohio was ordered to pay the United States for the reasonable cost

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[1] 38 U.S.C. §629 was renumbered to 38 U.S.C. §1729 by amendment effective August 6, 1991.

of medical treatment provided to David Bernath by the United States Department of Veterans Affairs. Bernath was a veteran who had been treated in a Veterans Administration ("VA") Hospital, free of charge as a veteran's benefit. The circuit court's affirmance established that 38 U.S.C. §1729 entitled the VA to recover from the State of Ohio under Ohio's Victims of Crime Act for health care provided to a veteran who was a victim of violent crime in Ohio, care for which the veteran was neither charged nor was expected to pay.

Bernath was a victim of a violent crime that occurred in Ohio on or about January 12, 1986. He suffered significant personal injuries and received initial emergency treatment at a private hospital. Subsequently, he underwent additional treatment at a VA hospital in Cleveland. As a veteran, Bernath was neither charged nor required to pay for his treatment at the VA hospital. The VA sought reimbursement through Bernath's reparations application, from the State of Ohio, for the cost of services rendered to Bernath and at no time has billed or sought payment from Bernath.

Bernath applied for compensation under the Ohio Victims of Crime Act, Ohio Rev. Code Ann. § 2743.51, *et seq.*, seeking recovery of the unreimbursed medical expenses he incurred and for nine months of wages lost as a result of his injuries. During the course of the State's investigation of Bernath's application, the VA sought reimbursement for the cost of services provided by the VA, for which Bernath was not responsible.

The Ohio Court of Claims granted Bernath's application for compensation as to the medical expenses he incurred as well as to the loss of wages. The court, however, denied the claim for the cost of his treatment at the VA because the VA's cost did not constitute an "economic loss" to the crime victim, since he did not incur any expense, and was therefore unrecoverable under Ohio law.

The State of Ohio, like many other states, has enacted legislation to use a portion of its limited resources to compensate innocent victims of crime. The Ohio Victims of

Crime Act (Ohio Rev. Code Ann. § 2743.51, *et seq.*), is a statutory program designed to pay expenses incurred by innocent victims of crime which are not reimbursed by insurance or other sources. A "claimant" under the Ohio statute is defined as (1) a victim of crime who meets the criteria set forth in Ohio Rev. Code Ann. § 2743.51(A)(2); (2) a dependent of a deceased victim; or (3) a third person, other than a "collateral source",[2] who legally assumes or voluntarily pays the obligations of a victim or of a dependent of the victim. Ohio Rev. Code Ann. § 2743.51(A).

The Ohio Victims of Crime Act does not create a death benefit, a form of health or accident insurance or a welfare fund. It merely provides a vehicle whereby certain persons, in a restricted way, can participate in a legislatively created class gift. The act is not to be construed broadly and requires a construction reasonably limited to the terms used. *In re Schroepfer,* 448 N.E. 2d 528 (1983).

The Ohio Court of Claims has jurisdiction to make awards of reparations for economic loss if it appears by a preponderance of the evidence that the requirements for award of reparations have been met. Ohio Rev. Code Ann. § 2743.52. The statute specifically defines "economic loss" as "economic detriment consisting only of allowable expense, work loss, funeral expense, unemployment benefits loss, and replacement services loss." Ohio Rev. Code Ann. § 2743.51(E). "Allowable expense" is defined as "reasonable charges *incurred* for reasonably needed products, services, and accommodations, including those for medical care, rehabilitation, rehabilitative occupational training, and other remedial treatment and care . . ." Ohio Rev. Code Ann. § 2743.51(E). (Emphasis added).

Under the Ohio statute, then, a claimant will receive an award of reparations for unreimbursed "economic loss." If

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[2] Collateral source is defined in Ohio Rev. Code Ann. § 2743.51(B) as "a source of benefits or advantages for economic loss otherwise reparable that the victim or claimant has received, or that is readily available to him . . ."

an otherwise qualified claimant has unreimbursed "economic loss" he will receive an award of reparations in like amount.[3] If an otherwise qualified claimant cannot show unreimbursed "economic loss", no award of reparations will be made. Bernath did not incur an economic loss for the treatment he received at the VA hospital and, for that reason, an award of reparations was not made for said amount. He did receive an award of reparations for the amount of the medical expense he owed the private hospital and for the amount the work loss he incurred.

The United States sought to recover its costs of medical care rendered to Bernath solely on the basis of 38 U.S.C. §1729. Congress, in 1981, enacted legislation authorizing the United States to recover the reasonable costs of caring for a veteran's non-service-related disability in those cases where the veteran would be eligible under state law to receive compensation for such medical care from a third party had the care not been provided by the VA. 38 U.S.C. §1729(a). Section 1729(a) provides in pertinent part:

> (a)(1) Subject to the provisions of this section, in a case in which a veteran is furnished care or services under this Chapter for a non-service-connected disability described in paragraph (2) of this subsection, the United States has the right to recover or collect the reasonable cost of such care or service (as determined by the Administrator) from a third party *to the extent that the veteran* (or the provider of the care or services) *would be eligible to receive payment for such care or services* from such third party if the care or services had not been furnished by a department or agency of the Untied States.
>
> (2) Paragraph (1) of this subsection applied to a non-service-connected disability —

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[3] All awards of reparations are limited to $50,000.00. Ohio Rev. Code Ann. § 2743.60(I).

. . .

> (C) that is incurred as the result of a crime of personal violence that occurred in the State, or a political subdivision of a State, in which a person injured as the result of such a crime is entitled to receive health care and services at such State's or subdivision expense for personal injuries suffered as a result of such crime. (emphasis added).

The statute further provides that "No law of any State or of any political subdivision of a State . . . shall operate to prevent recovery or collection by the United States under this section . . ." §1729(F).

The VA hospital sought recovery directly from Ohio's Crime Victims Program for services rendered to Bernath and at no time billed or sought payment from Bernath. The VA admits, in fact, that Bernath did not incur economic loss when he received free medical care from the VA.

The district court found that Ohio's construction and application of its crime victims compensation program discriminates against VA hospitals in violation of 38 U.S.C. §[1729], yet never specified the manner in which VA hospitals are treated differently from other providers. The district court also stated that Ohio's "economic loss" requirement is preempted to the extent it is inconsistent with §[1729], yet never specified the inconsistency.

The Sixth Circuit affirmed in a 2-1 decision, with a vigorous dissent from Judge Boggs. The majority seemed to rely on the presumed legislative intent of §1729 to end discrimination against the VA. Judge Boggs, in his dissent, strongly disagreed with the underlying basis of the majority's decision:

> Today the court establishes a per se rule that 38 U.S.C. §1729 entitles the Veterans Administration to recover under Ohio's Crime Victims Compensation Act for health care provided to a

> veteran who was injured during a violent crime in Ohio. Since this holding is inconsistent with the plain language of §1729, I must dissent. The Ohio statute does not discriminate against the Veterans Administration and, therefore, does not violate §1729.

(A-7).

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

This case raises the important issue of constitutional limitations on the federal government to support federal programs by seeking state funds from a state crime victim's fund intended only to benefit innocent victims of crime and not intended to benefit service providers. This case also involves the federal court's interpretation of a federal statute contrary to its plain language and inconsistent with congressional intent resulting in an unwarranted intrusion on the state. These are important questions of law which should be settled by this Court.

Pursuant to the Victims of Crime Act, Ohio Rev. Code Ann. § 2743.51 *et seq.*, the State of Ohio reimburses victims of violent crime for certain expenses incurred by the victims. Ohio compensates these victims, who meet all other qualifying criteria, for "economic loss" that has not been reimbursed by insurance or other collateral sources. Ohio Rev. Code Ann. § 2743.51(E). "Economic loss" is defined as "economic detriment consisting only of allowable expense, work loss, funeral expense, unemployment benefits loss, and replacement services loss." *Ibid.* Allowable expense includes "reasonable *charges incurred* for reasonably needed products, services, and accommodations, including those for medical care, rehabilitation . . . and other remedial treatment and care . . ." Ohio Rev. Code Ann. § 2743.51(F) (emphasis added).

Ohio's statute, then, provides only for the compensation of victims who have suffered unreimbursed economic loss. Ohio has chosen to restore a crime victim, to the extent

that it can, to the victim's economic situation before the crime. The statute's purpose is to lessen the impact of crime upon the victim by reimbursing him for unreimbursed economic loss, that is, "for reasonable charges incurred." Ohio Rev. Code Ann. § 2743.51(F). The statute was neither designed nor intended to compensate providers of services to crime victims.

Bernath was a qualified innocent victim of crime in the State of Ohio and was reimbursed, under the statute, for the "economic loss" he suffered. He was reimbursed for medical expense he incurred and for economic loss due to work loss. Bernath did not suffer "economic loss" when he received free medical care from the VA, as has been admitted by the United States. Rather, the United States asserted that the VA suffered an economic loss in treating Bernath and was thus somehow entitled to an award of reparations from the State of Ohio. The VA is not a proper claimant under the Ohio Statute, Ohio Rev. Code Ann. § 2743.51(A), and can only seek recovery through Bernath, who had received treatment at the VA, free of charge, as a veteran's benefit. Bernath was neither billed nor charged for any of the services and was not, nor will ever be, required to pay for the services. The Ohio Court of Claims, therefore, properly denied reimbursement of the cost of treatment provided by the VA hospital because it did not create an "economic loss" for the victim (Bernath).

38 U.S.C. Section 1729 authorizes the United States to recover the reasonable costs of caring for a veteran's non-service-related disability "to *the extent that the veteran . . . would be eligible* to receive payment for such care or services from [a] third party if the care or services had not been furnished by a department of the United States." (Emphasis added). It is upon this provision that the United States' entire theory of recovery is grounded.

The legislative history of §1729 clearly established that the purpose of the statute was to eradicate and prevent discrimination against the government in various state compensation programs:

> The reported bill would provide for the right of the Veterans Administration to recover the reasonable costs of care and services from a State (or political subdivision thereof), employer, employer's insurance carrier, or automobile accident reparations insurance carrier, to the extent that the veteran's or provider of care and services to the veteran, would be eligible to receive reimbursement for such care and services if they had not been furnished by the Veteran's Administration.
>
> The reported bill would strengthen and clarify the Veteran's Administration's authority to recover the cost of Veteran's nonservice-connected case from State workers' compensation, "no-fault" auto insurance and crimes of personal violence where a veteran would have entitlement to payment or reimbursement by a third party for appropriate medical care furnished in a non-federal hospital.

H.R. Rep. No. 79, 97th Cong., 1st Sess. 8, *reprinted in* 1981 U.S. Code Cong. & Admin. News 1685, 1692-93.

The circuit court's interpretation of 38 U.S.C. 1729 is flawed in two respects. First, the interpretation conflicts with the plain language of the statute. The statute provides that the United States has the right to recover to the extent that the veteran is eligible to recover. In the instant case, the veteran was not eligible to recover the amount at issue, yet the court's interpretation allowed the VA to recover anyway. Second, the interpretation does not further the stated Congressional intent. The intent was to eradicate differential treatment of the VA, yet the result is favored treatment of the VA.

The court's interpretation results in the federal government's unauthorized and unwarranted intrusion on limited state resources. This unsupported interpretation allows a federal agency to support its own budget by availing itself of limited state funds which have been designated solely for the purpose of making an innocent victim of violent crime economically whole, to the extent possible. Such an

instrusion can only be justified by a statute that is clear and unambiguous and which has a constitutional basis.

Section 1729 and its legislative history unequivocally state that the right of a federal hospital to recover is conditional upon the particular state statutory scheme at issue. The language is clear. "[T]he United States has the right to recover or collect the reasonable cost of such care or services . . . to *the extent that the veteran . . .* would *be eligible to receive payment . . .* if the care or services had not been furnished by a department of the United States." 38 U.S.C. §1729(a)(1). (Emphasis added).

The veteran's right to recover in a specific situation depends entirely on the provisions of the state statute creating entitlement. Section 1729 does not and cannot establish a special right of recovery for veterans who are innocent victims of crime apart from the language of the particular state victims compensation scheme at issue. Section 1729, by its very language, applies only where a veteran "is entitled to receive health care and services" pursuant to the state law. The right of states to establish conditions for recovery under a victims compensations statute has been recognized by the courts. The court reasoned in *United States v. State of New Jersey; Violent Crimes Comp. Bd.*, 831 F.2d 458, 462 (3rd Cir. 1987) that:

> Subsection (a)(1) does not eliminate all prerequisites to recovery contained in state compensation statutes. It only requires that a state consider a veteran's claim as it would consider a claim by someone not treated in a VA hospital, but presenting the same injury, and surrounding circumstances, such as the existence or non-existence of insurance. Subsection (a)(2)(C) speaks in terms of recovery where a crime victim "is entitled to receive health care and services at such State's . . . expense." This subsection, however, does not specify that the entitlement must come about through a non-discretionary decision making process. If, through its regular decision

> making process, the state determines that such a claimant is entitled to health care at the state's expense, the United States can recover from the state, under subsection (a)(1), the reasonable cost of treating the crime victim.

See also *United States v. State of Maryland,* 914 F. 2d 551, 555 (4th Cir. 1990).

Bernath is a veteran who was entitled to and received free medical care at the VA hospital. He was neither billed nor charged for the service and will never be expected to pay. He has no right to recovery under Ohio's statutory scheme. He has not suffered unreimbursed economic loss, a statutory requirement, with respect to the service provided by the VA. Respondent has conceded that Bernath did not suffer economic loss when he received free medical care from the VA.

The language of §1729 neither permits recovery nor permits the VA or the federal courts to ignore Ohio's statutory prerequisites. The VA has the right to recovery, under §1729, only to the extent that the veteran would be eligible to recover. The veteran in the instant case was not entitled to recovery for the cost of services at issue. There is no evidence, and there can be none, of the prerequisites of "economic loss" and "allowable expense" with reference to the free services that he received from the VA hospital. Absent his entitlement to recovery, the VA has no independent right of recovery under §1729. Section 1729 does not provide for preemption of Ohio's statutory requirements, but the circuit court's challenged interpretation most certainly does preempt Ohio's statutory requirements, a result that is contrary to the plain language of §1729.

Quite simply, the VA's right to recovery on the basis of 38 U.S.C. §1729 is limited to the extent that the veteran would be eligible to receive payment. Bernath was not entitled to receive payment under the Ohio statutory and the VA is likewise precluded.

It is beyond dispute that the purpose of §1729 was to eradicate and prevent "discrimination" against the federal government in various state compensation programs. Section 1729, however, provides only that state laws may not discriminate against federal health care providers. While it does require "equal footing", it does not require elevated footing as has occurred with the interpretation that is under attack.

The Ohio victims compensation scheme does not discriminate against the Veterans Administration. Rather, the statute places the VA on equal footing with all other providers of services to victims of crime in the state of Ohio. For an otherwise qualified claimant, economic loss is reimbursed only when an allowable expense is incurred by the victim. This is a prerequisite that applies equally to all providers, including the VA. A veteran who is a victim of crime in Ohio is not treated any differently from non-veterans with reference to statutory prerequisites. Nor is the veteran automatically denied reimbursement for services provided by a VA hospital because the hospital is run by the federal government.

A veteran, who is an otherwise qualified claimant under the Ohio program, is entitled to reimbursement for any unreimbursed economic loss. It makes no difference who provides the services, as long as it is an unreimbursed economic loss to the veteran. There is simply no differential treatment of the VA under the Ohio statute. If a private hospital charged for services, or if the VA charged for services, reimbursement would have been proper in the instant case. If a private hospital did not charge for services, or if the VA did not charge for services, reimbursement would not have been proper in the instant case. While the district court and the circuit court sought to use §1729 to eradicate "discrimination" against the federal government under the Ohio statute, neither court identified the "discrimination" that required eradication. To the contrary, the Ohio statute, on its face and in practice, does not discriminate against the VA because it does not treat two factually similar situations differently.

The only other circuits addressing this issue, *United States v. State of Maryland, supra,* and *United States v. New Jersey, supra,* wherein provisions of the crime victims compensation statutes of Maryland and New Jersey, respectively, were deemed in conflict with 38 U.S.C. §[1729], also failed to identify the differential treatment requiring eradication. Rather, the Fourth Circuit focused on assuring the VA's "right" to compensation from state crime victim funds, which exhausts limited state resourses, rather than whether the VA is actually being treated differently from other providers in contravention of §1729.

The Third Circuit, also failing to identify any differential treatment, goes one step further and holds that §1729 requires that claims by the VA be analyzed *as if the veteran had been treated in a non-federal hospital and had received a bill.* This judicial fiction, which provides the basis for the Third Circuit's conclusion, is nowhere provided for in the language of §1729 or its legislative history. Congress, if it intended that the court operate under this artificial construct, could have made its intent explicit in the statute, but did not.

The need for such an artifical construct, the failure of the circuit courts to identify, factually, differential treatment of the VA, and, in the instant case, allowing the VA to recover under §1729 even though the Ohio statutory requirements have not been met, all underscore the need for this Court to review.

Judge Boggs dissent below accurately asserts that the application and interpretation of §1729 in the instant case, in particular, "[f]ar from maintaining or providing equality, [actually] raises the VA to a privileged status not contemplated by §1729 and, indeed, directly opposed to the anti-discriminatory purposes of the provisions." (A-16) The application of §1729 herein exempted the VA from Ohio's statutory provisions, thus treating the VA more favorably than non federal providers. A proper claimant who is treated in a VA hospital, but not charged because of entitlement to veteran's benefits, is now entitled to recovery because of

the circuit court's interpretation of §1729. But, a proper claimant who is treated in a private hospital, but not charged, for whatever reason, is not entitled to recovery. Judge Boggs also states accurately "[t]hus, a person who was cared for because of membership in a religious order, a university or fraternal organization, or a health maintenance organization without right of subrogration, would not be reimbursed and the organization providing care would not be paid." (A-14) But, under the very same circumstances, the veteran would be entitled to recovery and the VA would be paid. Certainly, this is not an equitable application of the law. Rather, the advantage goes to the VA because of the circuit court's interpretation of §1729, an advantage that is neither stated nor contemplated in any reading of §1729.

Also, the court's application of §1729 creates special status for the VA which is not provided for in the Ohio statute. The VA is not a proper claimant under Ohio law and thus cannot seek recovery in its own right. That is, however, exactly what must occur in order to accommodate the court's interpretation of §1729. Bernath could not recover because he suffered no economic loss. The VA asserts that it suffered economic loss, but is not a proper claimant. Accordingly, a special status is created for the VA, a status which is not afforded any other provider of services to an innocent victim of crime.

The court's application of §1729 also seems to require that the VA be permitted to bill the State of Ohio directly, almost independent of the victim (since the veteran does not receive a bill and is not obligated to make payment). Such a mechanism is nowhere provided for in the Ohio statute and most certainly is not made available to any other provider of services.

Proper claimants, under the Ohio law, are required to establish the prerequisites for reimbursement, namely, that they have incurred economic loss. Veterans such as Bernath can make no such showing, and yet recovery will still be allowed under the court's application of §1729. Failure by the claimant to make such showing when treated by a private

hospital, by the very terms of the Ohio statute, requires a denial of reimbursement. But, under the very same circumstances, reimbursement must be made to the VA pursuant to the court's interpretation of §1729.

The Court's interpretation of §1729 creates one additional inequitable circumstance, but this time at the expense of the veteran. The practical application of allowing the federal government to reach limited state resources is the detriment to David Bernath and all other veterans who find themselves to be innocent victims of violent crimes in the State of Ohio. The maximum award to a claimant under the Ohio statute cannot exceed $50,000. Ohio Rev. Code Ann. §2743.64(E). Therefore, every time the federal government recovers state funds for "free" services rendered to Bernath and other similarly situated veterans, the maximum award Bernath and other veterans can recover for all other allowable expense, including other medical care, funeral expense, work loss, replacement services loss, or loss to dependents, is reduced in like amount. While respondent has asserted that, for some unspecified reason, the limitation might not apply in these cases, this serves again to highlight the favorable status the federal government seeks under the rubric of §1729.

As Judge Boggs noted in his dissent, the favorable status afforded the federal government at the expense of citizens of the State of Ohio, providers of services to innocent victims of crime, and veterans is neither required nor permitted by §1729:

> The Ohio law treats the VA like any other health care provider and does not, therefore, conflict with §1729 properly interpreted. If any other provider, public or private, chose to provide services to Bernath free of charge, an award of reparations for those services would not have been appropriate under Ohio law and would not have been made. By accepting the argument of the VA in this case, the majority requires Ohio to treat the VA *differently* than it would any other provider. The court grants the VA compensation when the victim has not

> incurred an uncompensated economic loss. The holding does not correct discrimination against or restore equality to the VA, but grants the federal government a privileged status. Such privilege is not required by §1729. (Emphasis in original).

(A-16).

Finally, the court's interpretation of the federal and Ohio statutes and subsequent preemption is violative of the Tenth Amendment. The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

While it is true that the Tenth Amendment will allow inroads into state laws pursuant to constitutionally delegated powers, there is no delegated power that requires the use of § 1729 to exempt the federal government from nondiscriminatory conditions of various state compensatory schemes. The court's holding that § 1729 preempts Ohio's "economic loss" requirement, a requirement that is applied to all innocent victims of crime, without regard to the provider of service, is an unconstitutional application of the law and is barred by the Tenth Amendment.

The Ohio statute does not discriminate against the VA and does not violate, nor is inconsistent with § 1729. The circuit court's interpretation of §1729 is contrary to the plain language of the statute which provides only that the VA can recover "to the extent that the veteran" would be able to recover. The veteran was unable to recover because he failed to prove the statutory prerequisite of "economic loss" and thus the VA is unable to recover. The circuit court's interpretation of § 1729 is also contrary to the intent of the statute. The statute is designed to eradicate discrimination against the VA in state crime victim compensation programs. The court's application, however, exempts the federal government from statutory prerequisites that are applicable

in all other cases, and actually creates a favored status for the federal government. Finally, the court's interpretation and application of §1729 resulting in the preemption of Ohio's nondiscriminatory statutory scheme is violative of the Tenth Amendment.

For all of these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Petition For Writ Of Certiorari has been forwarded to Freddi Lipstein, Department of Justice, Civil Division - Appellate Staff, Main Building - Room 3417, 10th and Constitution, Washington, D.C. 20530, Counsel for Respondent United States of America, via the U.S. Mail, this _____ day of May, 1992.

TIMOTHY J. MANGAN
Assistant Attorney General

No. 91-3289

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	**ORDER**
	)	
STATE OF OHIO,	)	
	)	
Defendant-Appellant.	)	
	)	

BEFORE: KENNEDY and BOGGS, Circuit Judges; and EDGAR,* United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Boggs would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

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*Hon. R. Allan Edgar sitting by designation from the Eastern District of Tennessee

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 91-3289

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	ON APPEAL from the United States District
STATE OF OHIO,	)	Court for the Southern District of Ohio
Defendant-Appellant.	)	

Decided and Filed February 20, 1992

Before: KENNEDY and BOGGS, Circuit Judges; and EDGAR, District Judge.*

EDGAR, District Judge, delivered the opinion of the court in which KENNEDY, Circuit Judge, joined. BOGGS, Circuit Judge (pp. 7-18), delivered a separate dissenting opinion.

EDGAR, District Judge. The district court entered a declaratory judgment that the "economic loss" requirement in Ohio's Victims of Crime Act, Ohio Rev. Code Ann. §2743.52 (Anderson 1981 & Supp. 1990), conflicts with and is

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* The Honorable R. Allan Edgar, United States District Judge for the Eastern District of Tennessee, sitting by designation.

preempted by 38 U.S.C. § 1729.[1] The State of Ohio was ordered to pay the United States the reasonable cost of medical treatment provided to Ohio resident David F. Bernath ("Bernath") by the United States Department of Veterans Affairs. The State of Ohio appealed. We **AFFIRM.**

I.

Bernath was the victim of a violent crime in Ohio. He received medical treatment at the Veterans Administration ("VA") hospital in Cleveland, as well as treatment at a private facility, Elyria Memorial Hospital. As a veteran, Bernath was not charged for the care that he received at the VA hospital. Bernath applied for benefits under Ohio's Victims of Crime Act, Ohio Rev. Code Ann. §§2743.51 - .72 (Anderson 1981 & Supp. 1990). The VA obtained an assignment from Bernath and submitted to the state a statement for $1,972.00 representing the reasonable cost of the medical care furnished by the VA to Bernath. The state awarded Bernath recovery for lost wages and medical costs he incurred at Elyria Memorial Hospital. However, because the state determined that Bernath had not suffered an "economic loss" as defined by Ohio Rev. Code Ann. § 2743.51(E) as a consequence of his treatment at the VA hospital, the VA was denied recovery.

In this suit brought by the United States, the district court via summary judgment awarded recovery of $1,972.00 to the United States under what is now 38 U.S.C. § 1729, holding that the "economic loss" provision of the Ohio statute conflicts with and is preempted by § 1729.

II.

38 U.S.C. § 1729 provides in relevant part:

> Subject to the provisions of this section, in any

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[1] 38 U.S.C. § 1729 was renumbered to 38 U.S.C. § 1729 by amendment effective August 6, 1991.

> case in which a veteran is furnished care or services under this chapter for a non-service-connected disability described in paragraph (2) of this subsection, the United States has the right to recover or collect the reasonable cost of such care or services (as determined by the Secretary) from a third party to the extent that the veteran (or the provider of the care or services) would be eligible to receive payment for such care or services from such third party if the care or services had not been furnished by a department or agency of the United States.

38 U.S.C. § 1729(a)(1).

> Paragraph (1) [the above quoted paragraph] of this subsection applies to a non-service-connected disability —
>
> . . . .
>
> that is incurred as the result of a crime of personal violence that occurred in a State, or a political subdivision of a State, in which a person injured as the result of such a crime is entitled to receive health care and services at such State's or subdivision's expense for personal injuries suffered as the result of such crime[.]

38 U.S.C. § 1729(a)(2)(C).

> [T]he United States shall be subrogated to any right or claim that the veteran (or the veteran's personal representative, successor, dependents, or survivors) may have against a third party.

38 U.S.C. § 1729(b)(1).

> No law of any State or of any political subdivision of a State, and no provision of any contract or other

> agreement, shall operate to prevent recovery or collection by the United States under this section . . . .

38 U.S.C. § 1729(f).

The Ohio statute allows payment when the claimant has suffered "economic loss" which is defined as "economic detriment consisting only of allowable expense, work loss, funeral expense, unemployment benefits loss, and replacement services loss." Ohio Rev. Code Ann. § 2743.51(E) (Supp. 1990). Allowable expense includes "reasonable charges incurred for reasonably needed products, services, and accommodations, including those for medical care . . ." Ohio Rev. Code Ann. § 2743.51(F) (Anderson 1981 & Supp. 1990). The State of Ohio says that since Bernath was not required to pay for his treatment at the VA hospital, he incurred no "allowable expense," suffered no "economic loss," and therefore, no recovery may be had. Moreover, says the state, it is Bernath, the injured victim, which the Ohio statute is intended to recompense, not heath care providers.

The difficulty with these arguments is that they fly in the face of Congress' intent in enacting 38 U.S.C. § 1729. This legislative history shows clearly that § 1729 was aimed precisely at state statutes such as Ohio's Victims of Crime Act which have the practical effect of preventing VA hospitals from recovering their costs in situations when a private hospital would be entitled to recover.

The House Report, which describes the enacted § 1729, states:

> Twenty-six States have statutes on compensating victims of crimes of personal violence; however, the Veterans' Administration has difficulty in collecting in nine States because (1) Federal hospitals are excluded as "other source of recovery"; (2) claims go directly to the victim and claims are not assignable; or (3) veterans are

not required to pay for medical care received.

> The reported bill would strengthen and clarify the Veterans' Administration's authority to recover the costs of veterans' nonservice-connected care from State workers' compensation, "no fault" auto insurance and crimes of personal violence where a veteran would have entitlement to payment or reimbursement by a third party for appropriate medical care furnished in a non-Federal hospital.

H.R. Rep. No. 97-79, 97th Cong., 1st Sess. 8 (1981), *reprinted* in 1981 U.S.C.C.A.N. 1685, 1693.

We join the Fourth and Third Circuits which have held that Maryland and New Jersey statutes, similar to the Ohio statute, do not prevent recovery by the VA under § 1729 for the reasonable cost of medical care or services rendered to veterans. *United States v. Maryland*, 914 F.2d 551 (4th Cir. 1990); *United States v. New Jersey*, 831 F.2d 458 (3d Cir. 1987).

The State of Ohio, and the dissent, focus on the language of § 1729(a)(1) which authorizes the United States to recover the reasonable cost of medical services "from a third party to the extent that the veteran (or the provider of the care or services) would be eligible to receive payment for such care or services from such third party if the care or services had not been furnished by a department or agency of the United States." The state says that the VA may not recover under this language because the state would not reimburse a crime victim/veteran who had been treated in a private hospital or health care provider which did not charge for its services. As both the Third and Fourth Circuits have said, the problem with this argument is that it is "inconsistent with economic reality" and the legislative history of § 1729. *Maryland*, 914 F.2d at 555; *New Jersey*, 831 F,2d at 462. The economic reality is that private hospitals do not provide free medical treatment. Thus, the VA is, for all practical purposes, denied recovery under the state statute, while private hospitals are not. This is exactly what happened in this case.

The State of Ohio paid Bernath for his expenses at Elyria Memorial, but not for his expenses at the VA hospital.

The legislative history is, as recited above, that Congress intended to prevent just the sort of thing that the Ohio statute attempts to do. "In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States,* 494 U.S. 152, 158 (1990). Since the Ohio statute conflicts with § 1729, it must give way under the Supremacy Clause, Article VI, of the United States Constitution. *Free v. Bland,* 369 U.S. 663, 666 (1962).

The dissent has raised the question of whether 38 U.S.C. § 1729 contravenes the Tenth Amendment by unreasonably infringing upon powers reserved to the states. This issue was not raised in the district court. We decline to consider it pursuant to the general rule that, absent "exceptional cases or particular circumstances," a federal appellate court will not consider issues not passed on by the district court. *Pinney Dock and Transport Co. v. Penn Central Corp.,* 838 F.2d 1445, 1461 (6th Cir.), *cert. denied,* 488 U.S. 880 (1988). There is nothing about this case that would warrant an exception to the rule.

III

The United States is entitled to recovery $1,972 from the State of Ohio. The judgment of the district court is **AFFIRMED.**

BOGGS, Circuit Judge, dissenting. Today the court establishes a per se rule that 38 U.S.C. § 1729 entitles the Veterans Administration to recover under Ohio's Crime Victims Compensation Act for health care provided to a veteran who was injured during a violent crime in Ohio. Since this holding is inconsistent with the plain language of § 1729, I must dissent. The Ohio statute does not discriminate against the Veterans Administration and, therefore, does not violate § 1729.

I

On January 12, 1986, veteran David F. Bernath was assaulted in a parking lot in Elyria, Ohio. Bernath suffered significant personal injuries and received initial emergency treatment at a private hospital. Subsequently, he underwent additional treatment at a VA hospital in Cleveland. As a veteran, Bernath was not required to pay for his treatment at the VA medical center. Instead, he assigned to the VA any rights he had to recover the cost of his medical care at the VA hospital from third parties.

Bernath applied for compensation under the Ohio Crime Victims Compensation Act, O.R.C. §2743.51 *et seq.*, for the costs he incurred for his medical treatment and for nine months of wages lost as a result of his injuries. The VA also sought reimbursement pursuant to the Ohio statute for the money it had spent on Bernath's treatment. On February 12, 1988, the Ohio Court of Claims issued an opinion and order awarding Bernath compensation for the amount he had paid for his medical expenses and lost wages. The court, however, denied the VA's claim for reimbursement for the cost of treatment provided because the cost did not constitute an "economic loss" to the crime victim and was therefore unrecoverable under the Ohio law.

In response, the United States filed this suit in federal district court. The district court granted summary judgment in favor of the federal government, holding that Ohio's victims compensation statute violates § 1729 because it discriminates against the United States. According to the district court, § 1729 entitled the VA to recover from the State of Ohio.

This court reviews a grant of summary judgment de novo. The case at hand involves the interpretation of two statutes; the parties have no factual disputes. This matter of law is appropriate for summary judgment in favor of one of the parties. The court affirms the district court and forces Ohio to pay the federal government for the cost of treating Bernath. In my view, however, Ohio's statute is consistent with the

requirements of § 1729 because it does not discriminate against the federal government.

II

In 1981, Congress enacted legislation authorizing the United States to recover the reasonable costs of caring for a veteran's non-service-related disability in those cases where the veteran would be eligible under state law to receive compensation for such medical care from a third party had the care not been provided by the VA. 38 U.S.C. § 1729(a). Section 1729(a) provides in pertinent part:

> (a)(1) Subject to the provisions of this section, in any case in which a veteran is furnished care or services under this Chapter for a non-service-connected disability described in paragraph (2) of this subsection, the United States has the right to recover or collect the reasonable cost of such care or services (as determined by the Administrator) from a third party to the extent that the veteran (or the provider of the care or services) would be eligible to receive payment for such care or services from such third party *if the care or services had not been furnished by a department or agency of the United States.*
>
> (2) Paragraph (1) of this subsection applies to a non- service-connected disability -
>
> . . .
>
> (C) that is incurred as the result of a crime of personal violence that occurred in the state, or a political subdivision of a State, in which a person injured as the result of such a crime is entitled to receive health care and services at such State's or subdivision's expense for personal injuries suffered as the result of such crime. (emphasis added).

The statute further provides that "No law of any State or of any political subdivision of a State . . . shall operate to prevent recovery or collection by the United States under this section. . . ." § 1729(f).

The legislative history of § 1729 makes clear that the purpose of the statute was to eradicate and prevent *discrimination* against the federal government in several state compensation programs:

> The reported bill would provide for the right of the Veterans Administration to recover the reasonable costs of care and services from a State (or political subdivision thereof), employer, employer's insurance carrier, or automobile accident reparations insurance carrier, to the extent that the veteran, or the provider of care and services to the veteran, would be eligible to receive reimbursement for such care and services if they had not been furnished by the Veterans' Administration.
>
> . . .
>
> The reported bill would strengthen and clarify the Veterans' Administration's authority to recover the costs of veterans' nonservice-connected care from State workers' compensation, "no-fault" auto insurance and crimes of personal violence *where a veteran would have entitlement to payment or reimbursement by a third party for appropriate medical care furnished in a non-federal hospital.*

H.R. Rep. No. 79, 97th Cong., 1st Sess. 8, *reprinted in* 1981 U.S. Code Cong. & Admin. New 1685, 1692-93 (emphasis added). Section 1729, then, prevents states from denying reimbursement for the costs of services in a federal hospital where such costs would have been paid for by the state if incurred in a non-federal hospital. In other words, the state may not deny recovery because the costs were incurred in a federal hospital rather than a non-federal one.

Both § 1729 and its legislative history unequivocally state that the right of the federal hospital to recover is entirely contingent on the veteran's right to recover given the circumstances and the particular state statutory scheme at issue. Under § 1729, the United States has the right to recover from the third party (in this case the State of Ohio) to the same extent that "*the veteran*" would be eligible to receive payment from the third party if services had not been performed by an agency of the federal government. Section 1729 prevents states from treating similarly situated federal and non-federal health care providers differently under various state compensation schemes. More precisely, the law preempts state laws that discriminate against the federal hospital because it is run by the United States government.

The right of a veteran to recover in a specific situation will depend, of course, on the provisions of the state statute creating the entitlement. Section 1729, then, does not and cannot establish a special right of recovery for veterans who are victims of crime apart from the language of the particular state victims compensation scheme at issue. By its own terms, § 1729 applies only where a veteran "is entitled to receive health care and services" under state law. Courts addressing this question have recognized that it is well within the rights of a state to condition recovery under a victims compensation statute on various prerequisites. In *United States v. State of New Jersey; Violent Crimes Comp. Bd.*, 831 F.2d 458, 462 (3rd Cir. 1987), for example, the court reasoned that:

> Subsection (a)(1) does not eliminate all prerequisites
> to recovery contained in state compensation statutes. It only requires that a state consider a veteran's claim as it would consider a claim by someone not treated in a VA hospital, but presenting the same injury, treatment, and surrounding circumstances, such as the existence or non-existence of insurance. Subsection (a)(2)(C) speaks in terms of recovery where a crime victim "is entitled to receive health care and services at such State's . . . expense." This subsection, however,

> does not specify that the entitlement must come about through a non- discretionary decisionmaking process. If, through its regular decisionmaking process, the state determines that such a claimant is entitled to health care at the state's expense, the United States can recover from the state, under subsection (a)(1), the reasonable cost of treating the crime victim.

See also *United States v. State of Maryland,* 914 F.2d 551, 555 (4th Cir. 1990). In this case, the veteran is not entitled to recovery under the nondiscriminatory Ohio statute for the cost of services provided by the VA, since he was not billed for those services. Since the veteran is not "entitled" to recovery here, then neither can the federal government recovery under § 1729.

This analysis is not changed by § 1729(f), which preempts state statutes that "operate" to discriminate against the federal government:

> [T]he United States would have us read subsection (f) of Section [17]29 to eliminate, when the United States is the party seeking compensation, all conditions on recovery set by state victims' compensation laws. Such a reading ignores the phrase "under this section" in subsection (f). Subsection (f) is not divorced from the language of subsection (a) that allows recovery by the United States only when the veteran would be eligible to receive payment, but for the fact that the VA provided his or her medical care.

United States v. New Jersey, 831 F.2d at 462. Just as § 1729 does not empower the VA to force a state to compensate veteran crime victims in the absence of a state decision, embodied in a statute, to compensate crime victims generally, neither does § 1729 allow the VA alter an existing compensatory statutory scheme to its own advantage by nullifying any general prerequisites to recovery established by the state.

Section 1729 does not entirely preempt all provisions of state victims compensation laws and automatically require payment to the federal government in these cases once a state establishes such a program. Section 1729 only requires that such laws may not discriminate against federal health care providers. Congress recognized that the effect of § 1729 would vary from state to state according to the language of the various state victims compensation acts. This fact is evidenced by the statement of the Congressional Budget Office that accompanied § 1729:

> It is extremely difficult to estimate with any precision the impact that this provision would have on VA recoveries, because the effects of the legislation would be different in each of the fifty states. State laws relating to . . . victims-of-crime compensation vary widely in language and application. The interpretation of the amendment would be expected to differ among states as well.

1981 U.S. Code Cong. & Admin. News 1700, 1703. The ability of the VA to recover the costs of Bernath's care in this case depends on the language of the Ohio statute. As long as the Ohio law does not discriminate against the federal government, then this court must give effect to that law.

III

Pursuant to the Ohio Crime Victims Compensation Act, O.R.C. § 2743.51 *et seq.*, Ohio reimburses certain expenses incurred by victims of violent crime within the state. Ohio compensates these victims for "economic loss" that has not been reimbursed by insurance or other collateral sources. O.R.C. § 2743.51(E). "Economic loss" is defined as "economic detriment consisting only of allowable expense, work loss, funeral expense, unemployment benefits loss, and replacement services loss." *Ibid.* "Allowable expense" includes "reasonable *charges* incurred for reasonably needed products, services, and accommodations, including those for medical care, rehabilita- tion . . . and other remedial treatment and care. . . ." O.R.C. § 2743.51(F) (emphasis added).

Ohio's statute, then, compensates victims only for unreimbursed economic loss. Ohio has chosen to restore crime victims, to the extent that it can, to *their* situation before the crime. It has chosen not to recompense good Samaritans or those with pre-existing obligations to care for an individual who turns out to be the victim of a crime. Thus, a person who was cared for because of membership in a religious order, a university or fraternal organization, or a health maintenance organization without right of subrogation, would not be reimbursed and the organization providing care would not be paid.

A crime victim applies for an award under Ohio's compensation statute by filing an application with the Ohio Court of Claims or Court of Common Pleas. O.R.C. § 2743.56. The court then forwards the application to the Ohio Attorney General's office, which investigates the case and makes a finding of fact and a recommendation regarding the claim. O.R.C. § 1743.58-59. The claim is then returned to a Court of Claims commissioner, who has jurisdiction to make an award of reparations for economic loss if the preponderance of the evidence establishes that the requirements for such an award have been met. O.R.C. § 2743.52. Either the Attorney General or the claimant may appeal a commissioner's decision to the Ohio Court of Claims. O.R.C. § 2743.61.

The State of Ohio argues correctly that its victims compensation scheme does not discriminate against the Veterans Administration. The statute places the VA on equal footing with all other providers of services to crime victims. An economic loss is only reimbursed by the state when it is an allowable expense actually incurred by the victim. This prerequisite does not impose any conditions upon the VA that are not applied to all other health care providers. Under the Ohio law, a veteran who is the victim of a crime is treated in exactly the same manner as a crime victim who is not a veteran. More importantly, however, in the case of a veteran crime victim, reimbursement for services rendered by a VA hospital is not automatically denied because the hospital is run by the federal government. Nor is such a case treated

any differently than one involving only care given by a non-federal hospital.

When a veteran is a victim of a crime in Ohio, that veteran is entitled to reimbursement for any uncompensated economic loss. If a hospital bills the veteran for services, and that bill is not covered by some form of collateral benefit, then the veteran will be compensated by Ohio because he has incurred the requisite "economic loss." The veteran will be compensated regardless of whether the hospital that provided the care is non-federal or is run by the Veterans Administration. On the other hand, if the hospital does not charge the veteran for care, then Ohio will not provide compensation, regardless of whether the hospital is government run or not, since the victim has suffered no "economic loss." All else being equal, then, under O.R.C. § 2743.51 the VA is permitted to recover from Ohio the cost of treating a veteran injured in a violent crime to the same extent as the state would reimburse the veteran if he had been treated in a private medical facility. Therefore, the Ohio law does not violate § 1729. So long as the VA is not subject to discriminatory treatment, a state is permitted under § 1729 to prescribe certain conditions to recovery, such as a prerequisite that the victim incur an "economic loss" as a result of the crime.

The statute does not, on its face or in practice, discriminate against the VA because it does not treat two similar factual situations differently, for the sole reason that a government hospital provided services in one case but not in the other. If the VA hospital bills the veteran for care, then the expense meets the prerequisite of the Ohio victims compensation law and the veteran victim will be reimbursed for the services. Since the VA did not bill the veteran in this case, he did not incur any economic loss and the U.S. may not recover from Ohio. Today the court holds that § 1729 requires this case to be analyzed as if the veteran had been treated in a non-federal hospital *and had received a bill.* However, there is imply nothing in the language of § 1729 or its legislative history to support the implementation of this judicially-created fiction. If Congress had intended for the courts to

operate under this artifical construct when presented with cases under § 1729, then that intent could have been made explicit in the statute. To say that the fiction follows directly from the language of § 1729 is a *non sequitur.* Far from maintaining equality, this fiction raises the VA to privileged status not contemplated by § 1729 and, indeed, directly opposed to the anti-discriminatory purposes of the provision.

The Ohio law treats the VA like any other health care provider and does not, therefore, conflict with § 1729 properly interpreted. If any other provider, public or private, chose to provide services to Bernath free of charge, an award of reparations for those services would not have been appropriate under Ohio law and would not have been made. By accepting the argument of the VA in this case, the majority requires Ohio to treat the VA *differently* than it would any other provider. The court grants the VA compensation when the victim has not incurred an uncompensated economic loss. This holding does not correct discrimination against or restore equality to the VA, but grants the federal government a privileged status. Such privilege is not required by § 1729.

According to the language of § 1729, the rights of the VA depend entirely upon the rights of the veteran under the circumstances of each case. Under § 1729, the United States is able to recover only "to the extent that the veteran" is eligible to recover under a particular state compensation scheme. § 1729(a)(2). If the veteran has a right to recover, then that recovery cannot be denied simply because services were performed at a federal hospital. In other words, § 1729 prevents discrimination against the federal government, but it does not mandate payment to the federal government in all circumstances and under any state compensation plan. The fact that a state victims compensation statute contains a prerequisite to recovery and that the prerequisite denies recovery to the VA in this case does not, by itself, make the prerequisite discriminatory. If the prerequisite treats the VA and private providers unequally in similar circumstances, then it is discriminatory and is preempted by § 1729. If, as in this case, the prerequisite applies equally in all

circumstances, there is no inconsistency with § 1729 and, therefore, no preemption.

For example, if Ohio chose to compensate all victims except those whose last names begin with the letter "W," the federal government could not use § 1729 to preempt this prerequisite and require compensation for all victims treated at VA hospitals, even for veterans whose names begin with "W," simply because the VA was sometimes denied compensation under the state requirement. Neither could the VA preempt Ohio's prerequisite under § 1729 if the VA for some reason chose only to provide health care to veterans with "W's" at the beginning of their last names. The VA could not then argue that Ohio's statutory prerequisite discriminated against the federal government. The prerequisite, albeit apparently irrational and perhaps open to attack on other grounds, would not discriminate against the federal government. In order to violate § 1729, a condition to recovery must treat federal and non-federal health care providers differently in similar circumstances.

The Veterans Administration was not denied compensation in this case because of the discriminatory operation of the Ohio law. It was denied compensation because the Ohio law operated as it should have given the circumstances, and as it would have regardless of whether unbilled services had been performed by a federal or non-federal provider. Compensation was denied because the VA chose not to bill Bernath for services, not because Ohio treated the federal government any differently than it would have treated a private hospital under identical facts. If Bernath's care had been provided by a charitable or fraternal organization or by a student health plan, for example, then he would not have been compensated under the Ohio law. Likewise, since Bernath did not incur the requisite "economic loss," the VA was denied reimbursement. Certainly, preemption of the Ohio law cannot be founded solely on the fact that the VA will be denied recovery if it does not bill its patients. No discrimination on the part of the state has been shown in this case. The fact that the VA's billing practices will often prevent it from recovering under this particular state law

cannot justify holding that § 1729 mandates recovery here. Ohio's statutory prerequisite to compensation denies recovery equally and grants recovery equally. It does not discriminate.

IV

It should also be recognized that this case raises the question of just how far it is constitutionally permissible for the federal government to go in its quest for additional state funds for support of a federal agency. It is certainly true that the Congress can make laws governing veterans' benefits as necessary and proper adjuncts to its delegated war powers, including the power to raise and support armies. *United States v. Oregon,* 366 U.S. 643, 648-49 (1961). However, although these powers may indeed be broad and sweeping, they are by no means inexhaustible. While the tenth amendment will allow certain inroads into state laws pursuant to these constitutionally delegated powers, it will at some point act as a barrier to federal confiscation of state funds.

Could Congress, for example, enact a direct tax on the state treasuries to provide health care for veterans? Could it decree that veterans are "egg producers" to obtain funding from a state subsidy program for "egg producers?" At some point, the federal government may go farther than the Constitution will tolerate. In any event, a thorough analysis of the boundaries of the war powers and the relative parameters of the tenth amendment is not necessary for upholding the Ohio statute. This issue, however, is strongly implicated by striking it down. For it cannot be denied that the tenth amendment issue becomes more pronounced as the Congressional intrusion on the states becomes greater, as is the case when § 1729 is used to exempt the federal government from *nondiscriminatory* conditions of various state compensatory schemes.

V

The Ohio statute, as interpreted and applied by the state,

does not discriminate against the VA and does not, therefore, violate § 1729. The court's preemption of the Ohio statute, by its overreaching and unsupported interpretation of § 1729, leaves in its wake a new compensatory scheme that discriminates in favor of the federal government. The VA is no longer bound by the nondiscriminatory prerequisite the state chose to enact as part of the structure of its victims compensation plan. Instead, the majority carves out a special and unwarranted privilege for the federal government at the expense of the people of Ohio. I dissent.

UNITED STATES of America, Plaintiff,

v.

STATE OF OHIO, Defendant.

No. C-2-89-0834

United States District Court,
S.D. Ohio, E.D.

Dec. 13, 1990.

OPINION AND ORDER

KINNEARY, District Judge.

This matter comes before the Court to consider the cross-motions of the parties for summary judgment. Fed.R.Civ.P. 56. The United States instituted the instant action seeking reimbursement from the State of Ohio for the cost of medical care provided by the Department of Veterans Affairs ("VA") to David Bernath, a violent crime victim in the State of Ohio. The United States also seeks a declaration that Ohio's policy of denying reimbursement to the United States for the reasonable cost of medical care and services furnished to Bernath and other similarly situated claimants contravenes federal law and the United States Constitution.

On January 12, 1986, David F. Bernath was the victim of a violent crime that occurred in the State of Ohio. Bernath received treatment at a Veteran's Administration ("VA") medical center on February 12 and 13, 1986, February 26 through March 1, 1986, and March 5, 1986 for personal injuries suffered as a result of the violent crime. The total cost of the treatment provided to Bernath by the VA hospital was $1,972.00. The VA did not bill for this cost.

On January 12, 1987, Bernath filed an application with the Ohio Court of Claims seeking benefits under Ohio's Victims of Crime Act, Ohio Rev.Code Ann. §§ 2743.-51-.72

(Anderson 1981 & Supp. 1989). The Ohio Attorney General conducted an investigation and recommended that Bernath receive an award of reparations in the amount of $12,179.08. This figure did not include reimbursement for medical treatment furnished by the VA because Bernath did not incur an economic detriment as a result of those services.

On August 4, 1987, Bernath executed a document titled "Assignment of a Right to Payment of All or Part of an Award of Reparations," which assigned to the VA his right to seek reimbursement from the State of Ohio for the $1972.00 the VA expended in providing treatment. The VA subsequently submitted a claim for reimbursement.

On February 12, 1988, the Victims of Crime Division of the Ohio Court of Claims issued an order and opinion authorizing payment to Bernath in the amount of $12,179.08. The claim for reimbursement of the cost of treatment provided by the VA was denied, however, because the cost did not constitute an "economic loss" for Bernath.

At issue is whether Ohio's denial of the VA's request for reimbursement on grounds that the VA did not incur an "economic loss" violates 38 U.S.C. § 629 (1988).[2]

Under section 629(a)(1), the United States is entitled to recover the cost of medical care provided to a veteran for non-service-related injuries from third parties to the same extent the veteran or a private health care provider would be eligible for reimbursement of costs if the services provided had not been furnished by the VA or other federal agency or department. 38 U.S.C. § 629(a)(1). Thus, this section "requires that a recovery claim by the United States be analyzed as if the veteran had received care in a hospital other than a VA hospital—in other words, as if the veteran had been treated by a provider that charged patients for care." *United States v. New Jersey*, 831 F.2d 458, 461-62

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[2] Resolution of this issues does not require the Court to address any Constitutional concerns.

(3d Cir. 1987). Included within the group of third parties from whom the United States may demand reimbursement are states and state political subdivisions, such as municipalities. 38 U.S.C. § 629(i)(3).

The federal statute expressly authorizes the United States to recovery from a state victims' compensation fund such as the Ohio Victims of Crime Act. *Id.* § 629(a)(2)(C). Recognizing that many states would resist reimbursing the VA for treating victims of violent crimes, Congress provided in this statute that no state or political subdivision of a state shall "operate to prevent recovery or collection by the United States under this section." *Id.* § 629(f). "Plainly Congress intended § 629 to end disrimination against federal hospitals that was taking place 'as a result of adverse court decisions and State statutes that are worded in such a fashion as to provide payment to private health care providers but exclude payment to federal health care providers.' " *United States v. Maryland,* 914 F.2d 551, 553 (4th Cir. 1990) (quoting H.R.Rep. No. 79, 97th Cong., 1st Sess. 29, *reprinted in* 1981 *U.S. Code Cong. & Admin.News* 1685, 1713).

Under Ohio Crime Victims Compensation Act, Ohio compensates victims of violent crimes for costs attributable to crimes committed against them. A claimant is entitled to receive "reparations" only for "economic loss" resulting from crimes of personal violence. Ohio Rev.Code § 2743.52.

The United States argues that under the Ohio Court of Claims interpretation of the Ohio Victims of Crime Act the only real question is whether the claimant suffered economic loss due to his injuries. It contends, however, given that the federal reimbursement statute assigns the United States an independent right of recovery coextensive with that right afforded an individual claimant, the Court of Claims must also determine whether the United States sustained an economic loss. Thus, the United States argues, the Court of Claims is required to determine whether the claimant would have suffered an economic loss if he had received treatment somewhere other than at a VA facility. Ohio's refusal to make this inquiry subjects the VA to discriminatory

treatment in violation of section 629.

Ohio contends that the VA is placed on an equal footing with all other providers of services to crime victims. An economic loss is only reimbursed where it is an allowable expense actually incurred by the victim. This necessary prerequisite does not impose any conditions upon the VA that are not applied to all others health care providers. Accordingly, the state argues, under section 2743.52 the VA is permitted to recover from Ohio the cost of treating a veteran injured in a violent crime to the same extent the state would reimburse the veteran if he had been treated in a private medical facility and thus section 629(a)(1) is satisified. It is Ohio's position that so long as the VA is not subjected to discriminatory treatment, a state is permitted under section 629 to prescribe certain conditions to recovery, such as a prerequisite that the victim incur an "economic loss." Under the instant facts, since Bernath was furnished medical treatment by the VA at no cost, Bernath did not "incur" an "economic loss" compensable under section 2743.52.

The federal courts considering state statutes containing provisions similar to the provision at issue here have consistently rejected the claim that an economic loss requirement will prevent recovery by the United States. A recent Fourth Circuit Court of Appeals decision soundly rejects the argument that a state victims' compensation act that imposes an economic loss condition[3] to recovery treats public and private health care providers equally since neither of the two are compensated for providing free care. *United States v. Maryland*, 914 F.2d 551 (4th Cir. 1990). In rejecting this argument, the court observed that VA hospitals provide free care approximately ninety-seven percent of the time, whereas private health care facilities rarely provide free, or reduced, medical care. The court reasoned, in light of this reality, that although the economic loss condition appears neutral on its face, its application discriminates against VA

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[3] A claimant under the Maryland statute was required to suffer a "serious financial hardship" in order to qualify for benefits.

hospitals solely because, as a practical matter, they will never sustain an "economic loss" as this condition is construed under the state statute. *Id.* at 554. Private health care providers, however, generally impose a charge for service rendered and thus enable the patient to seek relief. *Id.*

The *Maryland* court concluded that Congress intended section 629 to prevent not only overt discrimination against the VA which may appear on the face of a state statute, but also state practices which have a discriminatory effort. *Id.; see* 38 U.S.C. § 629(f) ("No law of any State . . . shall *operate* to prevent recovery or collection by the United States under this section . . . . ") (emphasis added). "Section 629 mandates that the . . . [state] must reimburse the United States if it would have reimbursed the veteran or a private hospital had a private hospital provided the care." *Maryland,* 914 F.2d at 555 (4th Cir. 1990).

The Court of Appeals for the Third Circuit considered a similar pecuniary loss requirement under a New Jersey state victims' compensation act in *United States v. New Jersey,* 831 F.2d 458 (3d Cir. 1987). New Jersey presented the same argument as that advanced by Ohio: the compensation act does not discriminate, it simply preconditions recover on the claimant incurring some type of pecuniary loss. In finding the state prerequisite preempted to the extend it excluded payment to the VA, the court held "Congress mandated that the cost of the VA's treatment be viewed as the cost of a non-federal hospital, for which the veteran would have received a bill." Id. at 463. Stated otherwise, section 629 dictates that reimbursement claims submitted by the VA be analyzed as if the veteran had received care by a private health care provider that charged for the care. *Id.* at 461-62. "Section 629 prohibits denial of a claim, made under a state victims' compensation statute, solely because the VA provided the medical care without cost to the crime victim." *Id.* at 459.

As in *Maryland,* the *New Jersey* court rejected the state's contention that the statute did not discriminate against the VA because a private health care providers would similarly

be denied benefits if they chose to provide medical services free of charge to their patients. *Id.* at 462 & n. 2. The court recognized that acceptance of such a contention would undermine Congressional intent and ignore the economic realities of the market place. *Id.* The argument now advanced by Ohio is nothing more than a reiteration of the same argument so thoroughly rejected by the Third and Fourth Circuits.

In *United States v. California*, CV-87-0036 HLH, 1987 WL 61203 (C.D. Calif. June 3, 1987), California also argued, like Ohio, that its victims' relief act provides reimbursement only where a legal liability is incurred. Since a veteran does not incur any liability to the VA for services rendered, the condition precedent to recovery is not satisfied. In rejecting this argument, the court observed that the language and legislative history of section 629 "is intended to cause the U.S. to be treated as a medical provider to whom a legal obligation is incurred by a victim veteran." *Id.* slip op. at 2. The court further noted that "federal law requires that the state treat veterans receiving medical care by the V.A. as a person who has incurred a legal obligation for the care, and it puts the United States in the position of the veteran victim." *Id.*

This Court finds the reasoning and analysis contained in the aforementioned cases persuasive and adopts it as its own. Ohio's construction and application of its crime victims compensation program discriminates against VA hospitals in violation of section 629. Contrary to the defendant's assertions, the present scheme places VA hospitals in a position which nearly guarantees they will never be eligible for reimbursement of costs. Under section 629, a state which reimburses crime victims for medical costs incurred during treatment by private health care providers must also reimburse the VA for the value of free care rendered to such crime victims. Ohio's treatment of the VA hospitals' claims does not satisfy this requirement, and thus the Ohio statute "economic loss" requirement is preempted to the extent it is inconsistent with section 629.

WHEREUPON, upon consideration and being duly advised, the Court finds the plaintiff's motion to be meritorious, and it is therefore, GRANTED. The Court further finds the defendant's motion to be without merit, and it is, therefore, DENIED. The Court ORDERS the parties to confer and agree on an appropriate entry for declaratory and money judgment within ten (10) days of issuance of this Opinion and Order.[4]

IT IS SO ORDERED.

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[4] The court reminds the parties that the judgment entry should not make any reference as to the constitutionality of the state statute or the construction thereof. The Court's analysis was founded on statutory construction and interpretation and did not require resolution of the constitutionality of the state statute.

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

IN RE: DAVID F. BERNATH : Claim No. V87-60469

DAVID F. BERNATH : OPINION

Applicant :

:::::::

On January 12, 1986, in Elyria County, Ohio, the applicant, David F. Bernath, suffered personal injury as a result of an assault by Kenneth R. Streets.

The assault was reported to the Elyria Police Department within seventy-two hours after the occurrence.

The assailant was found guilty of assault.

After careful review of the reparations application, the finding of fact and recommendation of the Attorney General, and the documents and evidence contained in the case file, I make the following determination.

As a result of the criminally injurious conduct of January 12, 1986 the claimant sustained a blow out fracture to his right eye and lacerations to his right eyebrown and lower lip. In obtaining treatment for those injuries the claimant incurred medical expense in the amount of $1,216.12. Additional medical treatment, valued at $1,972.00 was provided by the Veterans Administration at no cost to the claimant. Also, the claimant's injuries precluded his return to his place of employment, David Masters Building Company, Inc., for a period in excess of thirty-four weeks, during which time $10,962.96 in work loss was incurred.

The Attorney General recommended an award of reparations to the claimant in the amount of $12,179.08: $1,216.12 for the claimant's unreimbursed allowable medical

expense, and $10,962.96 for work loss. Additionally, the Attorney General recommended that no amount be paid on the assignment form, executed on August 4, 1987, in which the Veterans Administration was named as assignee. The Attorney General based this recommendation on a finding that the services provided by the Veterans Administration did not create an economic loss for the claimant and as such would not be a proper subject of a reparation grant.

I find the Attorney General's first recommendation, to grant an award of reparation in the amount of $12,179.08, to be reasonable, lawful, and supported by a preponderance of the evidence. Therefore the claimant will be granted an award of reparations in the amount of $12,179.08 in an order issued with this opinion. In regard to the Attorney General's recommendation that the August 4, 1987 assignment to the Veterans Administration not be enforced:

> R.C. 2743.52 states:
>
> The court of claims commissioners that are appointed pursuant to section 2743.54 of the Revised Code have jurisdiction to make awards of reparations *for economic loss* arising from criminally injurious conduct, if satisfied by a preponderance of the evidence that the requirements for an award of reparations have been met.

There is no evidence that the claimant incurred economic loss in obtaining the medical treatment provided by the Veterans Administration. Therefore, I find the assignment, executed on August 4, 1987 on behalf of the Veterans Administration, to be invalid and unenforceable.

FINDINGS OF FACT

On January 12, 1986, in Elyria County, Ohio, the applicant, David F. Bernath, suffered personal injury as a result of an assault by Kenneth R. Streets.

The assault was reported to the Elyria Police Department within seventy-two hours after the occurrence.

The assailant was found guilty of assault.

The applicant incurred unreimbursed allowable expense in the amount of $1,216.12.

The applicant incurred unreimbursed work loss in the amount of $10,962.96 from January 20, 1986 to October 1, 1986.

The claimant executed an assignment on August 4, 1987, on behalf of the Veterans Administration, which is invalid.

CONCLUSIONS OF LAW

1) The applicant qualifies as a claimant as defined by R.C. 2743.51(A).

2) The applicant has suffered net economic loss, as defeined in R.C. 2743.51(E), in the amount of $12,179.08, consisting of $1,216.12 in allowable expense, as defined in R.C. 2743.51(F), $10,962.96 in work loss, as defined in R.C. 2743.51(G).

3) The applicant is granted an award in the sum of $12,179.08.

4) Pursuant to R.C. 2743.66(E)(5) I find the assignment, executed on August 4, 1987, to be invalid and unenforceable.

* * * * *

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

IN RE: DAVID F. BERNATH : Claim No. V87-60469

DAVID F. BERNATH : ORDER

Applicant :

:::::::

1) Judgment is rendered against the State of Ohio and the Director of Budget and Management as its agency for payment of the award in the amount of $12,179.08, in a lump sum.

2) The warrant issued in payment of this judgment to the applicant shall be sent by the Director of Budget and Management to the applicant at the address certified to the Director by the clerk of this court.

3) This order is entered without prejudice to the applicant's right to file a supplemental reparations application pursuant to R.C. 2743.68 if the applicant incurs economic loss not considered in this determination and not reimbursed from other persons, including collateral sources.

4) This award is expressly conditioned upon the subrogation provisions of R.C. 2743.72, which require any benefits or advantages received from any collateral source, including the offender, be repaid to the State of Ohio.

5) The purported assignment submitted by The Veterans Administration is invalid and shall not be enforced.

6) The clerk shall send a copy of this opinion and order to Veterans Administration Medical Center, 10701 East Blvd., Cleveland, Ohio 44104.

7) Costs assumed by the reparations fund.

PHILIP H. SHERIDAN, JR.
Commissioner

ID #6046Y/cls-880121/6

A copy of the foregoing was sent by regular mail to Lorain County Prosecuting Attorney and to:

V87-60469	V87-60469	V87-60469
David F. Bernath	Veterans Admin. Med. Ctr	ELIO P. ZERBINI, ESQ.
40 Sandy Lane	10701 East Blvd.	315 Middle Avenue
Elyria, Oh 44035	Cleveland, Oh 44104	Elyria, Oh 44035

REPARATIONS
JOURNAL

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Supreme Court, U.S.
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(2)

No. 91-1926

In the Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF OHIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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QUESTIONS PRESENTED

1. Whether the court of appeals properly interpreted 38 U.S.C. 1729 to preempt the "economic loss" provision of the Ohio Crime Victims Compensation Act and to grant the United States recovery of the costs of providing free medical treatment to a veteran/crime victim.

2. Whether the court of appeals correctly declined to consider whether Section 1729 violates the Tenth Amendment because petitioner raised the claim for the first time on rehearing.

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In the Supreme Court of the United States

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STATE OF OHIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A2-A19, is reported at 957 F.2d 231. The opinion of the district court, Pet. App. A20-A26, is reported at 756 F. Supp. 340.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1992. A petition for rehearing and rehearing en banc was denied by the court of appeals on April 3, 1992. Pet. App. A1. The petition for a writ of certiorari was filed on June 1, 1992.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Veterans Affairs (VA) operates a vast system of hospitals and medical centers to provide treatment for armed services veterans for both service- and non-service-connected disabilities. In 1981, Congress enacted legislation to enhance the VA's ability to recover costs incurred furnishing medical care to veterans with non-service-connected disabilities. 38 U.S.C. 1729. See H.R. Rep. No. 79, 97th Cong., 1st Sess. 8 (1981).[1] Section 1729(a) authorizes the United States to recover from a third party the cost of VA treatment provided to a veteran with a non-service-connected disability when the veteran would have been eligible for compensation from the third party if the care had not been provided by the VA. 38 U.S.C. 1729(a)(1). States are designated as "third part[ies]," 38 U.S.C. 1729(i)(3)(A), and the statute explicitly authorizes the United States to recover from state crime victims compensation funds. 38 U.S.C. 1729(a)(2)(C).

Section 1729 also declares that "[n]o law of any state * * * shall operate to prevent recovery * * * by the United States under this section." 38 U.S.C. 1729(f). Prior to the enactment of the current version of Section 1729, VA efforts to collect reimbursements from state crime victims compensation programs were hindered by state statutes "worded in

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[1] 38 U.S.C. 1729, formerly 38 U.S.C. 629 (1988), was recodified at 38 U.S.C. 1729 by the Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, § 5(a), 105 Stat. 406.

such a fashion as to provide payment to private health care providers but exclude payment to federal health care providers." See H.R. Rep. No. 79, *supra*, at 29. Often the VA was precluded from obtaining reimbursement under these statutes because the VA did not require veterans to pay for their medical care. *Id.* at 8. Congress enacted Section 1729(f) to "strengthen and clarify" the VA's authority to recover the costs of medical treatment when state crime victims compensation programs try to deny VA recovery on the ground that "veterans are not required to pay for medical care." H.R. Rep. No. 79, *supra*, at 8.

2. Under the Ohio Crime Victims Compensation Act, the State of Ohio compensates individuals for certain costs attributable to crimes committed against them. Ohio Rev. Code Ann. §§ 2743.51 *et seq.* (Anderson 1991). Ohio reimburses crime victims for "economic loss" suffered as a result of violent crime, Ohio Rev. Code Ann. § 2743.52(A) (Anderson 1991), including victims' medical costs and lost wages. Ohio Rev. Code Ann. § 2743.51(E)-(G) (Anderson 1991).

3. The district court decided this case on summary judgment. Pet. App. A20. The following facts are uncontroverted.

On January 12, 1986, David F. Bernath, a veteran of the United States Armed Forces, was the victim of a violent crime in the State of Ohio. Immediately after the crime, Bernath received emergency treatment at a private hospital, for which he was charged $1,216.12. Subsequently, he obtained additional treatment at the Veterans Administration (VA) Medical Center in Cleveland, Ohio. As a veteran of the Armed Forces, Bernath was not required to pay for this treatment, which cost the VA $1,972. Pet. App. A20, A28-A29.

Bernath applied for compensation under the Ohio Crime Victims Compensation Act (OCVCA) for the costs of his private hospital treatment and for lost wages incurred because of his injuries. After Bernath assigned the United States his right to recover from third parties the costs of his VA treatment, the United States sought reimbursement under the OCVCA for those costs.

The Ohio Court of Claims awarded Bernath full reimbursement for lost wages and for medical treatment at the private hospital, but denied the United States recovery on Bernath's assigned claim for the costs of his VA hospital treatment. The court stated that because the VA had not charged Bernath, these costs did not represent "economic losses" to him. Pet. App. A21.

The United States filed suit against the State of Ohio in United States district court to recover the costs of Bernath's VA treatment. The government asserted that Ohio's refusal to reimburse the VA on the ground that Bernath had not suffered "economic loss" conflicted with Section 1729 and therefore was preempted under the Supremacy Clause of the Constitution. U.S. Const. Art. VI, Cl. 2.

4. The district court granted summary judgment in favor of the United States. Pet. App. A20-A26. The court found that Ohio contravened Section 1729 (a)(1) by compensating crime victims billed for private hospital care while at the same time refusing to compensate the VA for free care given to crime victim veterans. The court explained that Section 1729 (a)(1) instead requires States to compensate the VA for the costs of medical treatment provided to victims who themselves would have been compensated if their treatment had been obtained at a private hospital. Pet. App. A23-A25. Accordingly, the court held that

under the Supremacy Clause of the United States Constitution, Section 1729 preempts Ohio's "economic loss" requirement for reimbursement of VA medical care. Pet. App. A25.

The court expressly rejected petitioner's argument that the Ohio statute does not conflict with Section 1729 because it applies equally to the VA and private hospitals by conditioning recovery on "economic loss" regardless of where the victim receives treatment. Pet. App. A23-A25. The court reasoned that while the "economic loss" requirement treats the VA and private hospitals equally on its face, it does not apply equally in practice because private hospitals almost always charge for treatment while VA hospitals almost never do. *Id.* at A23-A24. Providing compensation for the costs of medical treatment only when a victim suffers "economic loss" effectively bars recovery by the VA while allowing it by private hospitals, and therefore conflicts with Section 1729. Pet. App. A23-A25.

5. The court of appeals affirmed, and agreed that Section 1729 preempts the OCVCA "economic loss" requirement. Pet. App. A7. It too rejected Ohio's argument that the "economic loss" requirement treats VA and private hospitals equally, noting that such a requirement is inconsistent with the "economic reality" that the VA provides free medical treatment while private hospitals do not. *Id.* at A6. The court added that Ohio's attempt to avoid compensating the United States for Bernath's medical costs flew "in the face of Congress' intent in enacting 38 U.S.C. § 1729" (*id.* at A5), and further noted that the legislative history of the statute showed "that Congress intended to prevent just the sort of thing that the Ohio statute attempts to do [here]." *Id.* at A7.

Judge Boggs dissented, asserting that the OCVCA was not preempted by Section 1729 because it did not facially discriminate against the United States. Pet. App. A8-A18. He also suggested that Section 1729 might be vulnerable to Tenth Amendment challenge if the court's interpretation of the Section were correct. Pet. App. A18.

ARGUMENT

Review by this Court is unwarranted. This decision is fully consistent with the decisions of the two other courts of appeals that have ruled on the preemptive effect of Section 1729 on state crime victims compensation fund requirements. Moreover, petitioner does not cite, nor have we found, any state decisions which conflict with this interpretation of Section 1729. The State of Ohio here simply contends that the court of appeals erred in interpreting Section 1729.

1. Both the district court and the court of appeals correctly held that the plain language of Section 1729 preempts the operation of an "economic loss" provision to deny recovery to the VA. Section 1729 requires a third party to compensate the United States for the costs of non-service-connected medical care provided to veterans who "would be eligible to receive payment for such care or services from such third party *if the care or services had not been furnished by* [*the VA*]." 38 U.S.C. 1729(a)(1) (emphasis added). The statutory definition of "third party" explicitly includes "a State or political subdivision of a State." 38 U.S.C. 1729(i)(3)(A). Furthermore, the statute specifies that "non-service-connected" medical care includes care required "as the result of a crime of personal violence that occurred

in a State * * * in which a person injured as a result of such a crime is entitled to receive health care and services at such State's * * * expense for personal injuries suffered as the result of such crime." 38 U.S.C. 1729(a)(2)(C).

In this case, Bernath was compensated under the OCVCA for the costs of his private hospital treatment; Ohio refused, however, to compensate the VA for its treatment of the same injuries. Denying compensation to the United States for the costs of this treatment violates the mandate of Section 1729 that States compensate the United States for VA treatment in the same way that they compensate victims who pay for such treatment at private hospitals.

Ohio argues that the VA and private hospitals are treated equally under the OCVCA because both are subject to the requirement that a patient suffer "economic loss" before the hospital is compensated. Pet. 15. However, as the court of appeals recognized, Ohio's "economic loss" provision contravenes Section 1729 because "[t]he economic reality is that private hospitals do not provide free medical treatment. Thus, the VA is, for all practical purposes, denied recovery under the state statute, while private hospitals are not." Pet. App. A6. Accord *United States* v. *Maryland*, 914 F.2d 551, 554 (4th Cir. 1990); *United States* v. *New Jersey*, 831 F.2d 458, 462 (3d Cir. 1987).

Both the text and the legislative history of Section 1729 support the court of appeals' conclusion that the OCVCA "economic loss" requirement is preempted. In Section 1729, Congress specifically stated that "[n]o law of any State * * * shall *operate* to prevent recovery or collection by the United States * * * with respect to care or services furnished." 38 U.S.C.

1729(f) (emphasis added). Congress's choice of the word "operate" reflects its decision to "prevent not only discrimination against the federal government which appears on the face of a state statute, but also discrimination which takes place in practice." *Maryland*, 914 F.2d at 554. Such discrimination against VA hospitals previously occurred "as a result of adverse court decisions and State statutes that are worded in such a fashion as to provide payment to private health care providers but exclude payment to federal health care providers." H.R. Rep. No. 79, *supra*, at 29. The OCVCA economic loss requirement operates to prevent the United States from recovering costs incurred by the VA "in" treating veteran/crime victims; this conflicts with Section 1729 and with Congress's concerns about state laws that refuse to compensate for VA care on the ground that "veterans are not required to pay for medical care." H.R. Rep. No. 79, *supra*, at 8. Accord *Maryland*, 914 F.2d at 553-554; *New Jersey*, 831 F.2d at 462-463.

Contrary to petitioner's contention (Pet. 16-17), allowing the United States to recover the costs of free VA care through preemption of the economic loss requirement does not give privileged status to VA hospitals over private hospitals. The court of appeals' interpretation of Section 1729 simply reflects Congress's decision "that the cost of the VA's treatment be viewed as the cost of a non-federal hospital, for which the veteran would have received a bill." Pet. App. A24 (quoting *Maryland*, 914 F.2d at 463).

Petitioner also contends that interpreting Section 1729 to allow recovery for VA medical treatment creates the "inequitable circumstance" of reducing a victim's maximum possible recovery for other crime-related losses because "[t]he maximum available award to a[ny] claimant under the Ohio statute can-

not exceed $50,000." Pet. 18. However, no such limitation on a veteran's award for other crime-related losses occurred in this case, and Ohio has not pointed to any instance in which it has, either in Ohio or in any other State. Moreover, even if an award for VA care were set off against a veteran's compensation for other losses when total losses exceeded a state prescribed maximum—an issue not before this Court—allowing the VA to recoup the costs of treatment for non-service-connected disabilities enables the federal government to provide important benefits to all veterans. In addition, a veteran who would have the costs of his VA care set off against an award for other crime-related losses when total losses exceed a state maximum would be treated no differently than a veteran charged for the same care at a private hospital. The private hospital costs also would be set off against the veteran's potential maximum award.

Two other courts of appeals have addressed whether a state criminal victims compensation fund requirement similar to the Ohio "economic loss" requirement conflicts with Section 1729. Both courts have reached the same conclusion as the court of appeals did in this case. The Third Circuit, confronted with a New Jersey crime victims compensation statute analogous to Ohio's, found that Section 1729 "prohibits denial of a claim, made under a state victims' compensation statute, solely because the VA provided the medical care without cost to the crime victim." *New Jersey*, 831 F.2d at 459. The Fourth Circuit similarly held that Section 1729 preempted an economic loss requirement in the Maryland crime victims compensation scheme. The court explicitly rejected the argument that the requirement treated the VA and private hospitals equally. Finding the argument "inconsistent with economic reality," the court held that the Mary-

land provision was preempted by Section 1729 because it "operate[d] to discriminate against VA hospitals." *Maryland*, 914 F.2d at 555. Accord *United States* v. *California*, No. CV 87-0036 HLH (C.D. Cal. June 2, 1987) (holding that Section 1729 requires States to reimburse the VA for free medical treatment provided to crime victims in the same manner that the States compensate victims for charges incurred in private hospitals); *United States* v. *Illinois*, No. CV 86-C-10153 (N.D. Ill. Jan. 8, 1988) (same).

2. Petitioner claims that Section 1729 violates the Tenth Amendment by preempting Ohio's application of the "economic loss" requirement and by authorizing the United States to recover the costs of VA hospital treatment from the States. Pet. 19. The court of appeals properly declined to consider the Tenth Amendment claim—raised for the first time by the dissenting judge—because petitioner had not raised it in district court. Pet. App. A7. See *Singleton* v. *Wulff*, 428 U.S. 106, 120-121 (1976); *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941). This Court similarly should not consider the claim because it was not considered by the lower courts. See *FW/PBS, Inc., dba Paris Adult Bookstore II* v. *City of Dallas*, 493 U.S. 215, 224 (1990) ("It is this Court's practice to decline to review those issues neither pressed nor passed upon below."); *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988) ("This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court."). Petitioner has offered no explanation for its failure to raise the Tenth Amendment argument below, and no extraordinary circumstances exist which might justify review of that belated claim by this Court.

In any event, petitioner's Tenth Amendment argument is without merit. Section 1729 "does not require states to award compensation to crime victims. It requires only that once states set up victim compensation schemes, they must not deny benefits simply because the VA has already provided a benefit to the crime victim—namely, medical care without cost to the injured veteran." *New Jersey*, 831 F.2d at 464-465. "Especially when Congress has acted pursuant to its war powers, Art. I, § 8, cl. 12-14, the Tenth Amendment does not bar such a slight interference with a state compensation program." *Id.* at 465. Accord *Maryland*, 914 F.2d at 555 (rejecting claim that Section 1729 violates the Tenth Amendment). See also *United States* v. *Oregon*, 366 U.S. 643, 648-649 (1961) (upholding against Tenth Amendment challenge a federal statute giving property of veterans who die intestate in government facilities to the federal government when such property would otherwise go to the State); *Cantwell* v. *County of San Mateo*, 631 F.2d 631, 636-637 (9th Cir. 1980) (holding that a federal statute which grants credit for active military service in calculating retirement pay from both the armed forces and the County of San Mateo preempts a state statute which prohibits crediting active duty when calculating county retirement pay if the employee receives a separate pension for military service), cert. denied, 450 U.S. 998 (1981); *Texas Employers' Ins. Ass'n* v. *United States*, 569 F.2d 874 (5th Cir.) (holding under a VA regulation that the United States could recover from the Texas Employers' Insurance Association the cost of medical services provided by the VA to an injured veteran/employee covered by the Texas Workmen's Compensation Act, despite a state law that voided any em-

ployee's claim assigned to the VA), cert. denied, 439 U.S. 826 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

CASE NO. 91-1926

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF OHIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSTION TO CERTIORARI

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REPLY ARGUMENT IN SUPPORT OF CERTIORARI

Petitioner has asserted that the court's interpretation of the federal and Ohio statutes and subsequent preemption of the state statute is violative of the Tenth Amendment.

Respondent asserts that this Court should not consider this claim because "[t]he court of appeals properly declined to consider the Tenth Amendment claim - raised for the first time by the dissenting judge - because petitioner had not raised it in the district court." Respondent United States' Brief in Opposition to Petition for Writ of Certiorari, p. 10. This assertion is erroneous.

Petitioner raised this claim in the district court:

> The underlying premise of §629, which seeks to shift part of the cost of caring for veterans from the federal government to state crime victim compensation funds, is suspect and probably unconstitutional. §629 seeks no less than to have the states, without due process or proportional representation, pay part of the cost of caring for veterans out of their respective treasuries, and/or from funds supplied by the federal government for the purpose of helping crime victims. This wholesale raid on state treasuries to support a federal program would appear to be barred by the Tenth Amendment to the United States Constitution, which reserves all rights not delegated to the federal government to the states. The federal government does not have the power to pass laws requiring the states to pay the cost of federal programs from their own treasuries. *See Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985), *reh'g. denied,* 471 U.S. 1049 (1985); U.S. Const. Art. I, §8. To permit this is tantamount to denying the states every meaningful vestige of sovereignty.

Reply Of Defendant, State of Ohio, to Plaintiff's Memorandum

In Opposition To Defendant's Motion For Summary Judgment, p. 7, fn.1.

Contrary to Respondent's assertion, therefore, Petitioner's claim that 38 U.S.C. §1729 violates the Tenth Amendment by preempting Ohio's application of its statutory "economic loss" requirement and by allowing the federal government to take state funds to support a federal agency, was raised in the district court and should be considered by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Brief To Brief In Opposition To Certiorari has been forwarded to Kenneth W. Starr, Solicitor Generai; Stuart M. Gerson, Assistant Attorney General, and Freddi Lipstein, Attorney, Department of Justice, Civil Division - Appellate Staff, Main Building - Room 3417, 10th and Constitution, Washington, D.C. 20530, Counsel for Respondent United States of America, via the U.S. Mail, this _____ day of August, 1992.

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